



BRB No. 16-0362 BLA

KAFEY RUE HENSLEY)	
(Widow of HAROLD D. HENSLEY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
APPOLO FUELS, INCORPORATED)	
)	
and)	
)	
SECURITY INSURANCE COMPANY OF)	DATE ISSUED: 01/30/2017
HARTFORD)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry A. Temin,
Administrative Law Judge, United States Department of Labor.

Kafey Rue Hensley, Corbin, Kentucky.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and
ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order
Denying Benefits (2014-BLA-5868) of Administrative Law Judge Larry A. Temin

¹ Claimant is the widow of a miner, who died on June 27, 1991. Director's
Exhibit 8.

rendered on a subsequent survivor's claim² filed on March 4, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge denied this subsequent claim in accordance with 20 C.F.R. §725.309(c)(4), because he found that claimant did not establish a change in an applicable condition of entitlement since the denial of her previous survivor's claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer, nor the Director, Office of Workers' Compensation Programs, filed a substantive response.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a survivor's claim filed more than one year after the effective date of a final order denying a previous survivor's claim, "must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(c)(4); see *Moser v. Director, OWCP*, 25 BLR 1-97, 1-99 (2013); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-38, 1-40 (2004).

The administrative law judge determined correctly that Section 422(l) is not applicable in this case because the miner's claim for benefits did not result in a final award of benefits.³ 30 U.S.C. §932(l) (2012); 20 C.F.R. §725.309(c)(1); Director's

² This is claimant's third claim for survivor's benefits. Her initial claim, filed on November 26, 1991, was finally denied by the district director on November 30, 1992, for failure to establish that the miner suffered from pneumoconiosis. Director's Exhibit 1. Claimant filed her second survivor's claim on February 5, 2002, which was finally denied by the district director on March 13, 2003, for failure to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Director's Exhibit 2.

³ Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), provides that for claims filed after January 1, 2005 and pending on or after March 23, 2010, the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Exhibit 1-12; Decision and Order at 4. The administrative law judge also correctly found that the conditions of entitlement that claimant failed to establish in her initial survivor's claim related solely to the miner's physical condition at the time of his death. Decision and Order at 5; Director's Exhibit 1. Therefore, the administrative law judge properly determined that claimant's subsequent claim must be denied.⁴ See 20 C.F.R. §725.309(c)(4); *Moser*, 25 BLR at 1-101; *Boden*, 23 BLR at 1-41.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ The administrative law judge did not address whether claimant could benefit from the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. 921(c)(4). To invoke that presumption, claimant would need to prove that the miner had a totally disabling respiratory or pulmonary impairment. This is a condition of entitlement related solely to the miner's physical condition at the time of his death. See 20 C.F.R. §725.309(c)(4); *Moser v. Director, OWCP*, 25 BLR 1-97, 1-101 & n.4 (2013). As previously noted, in order to succeed in a subsequent claim, a surviving spouse must establish at least one condition of entitlement unrelated to the miner's physical condition. In this case, there is no evidence of such an additional change. 20 C.F.R. §725.309(c). Thus, even if claimant established that the miner had a totally disabling respiratory impairment, her subsequent survivor's claim would be barred.